SOO HONG & LEONG KEW MOI & ORS.

v.

UNITED MALAYAN BANKING CORP. BHD. & ANOR.

COURT OF APPEAL, KUALA LUMPUR
MAHADEV SHANKAR JCA
ABDUL MALEK AHMAD JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: A-01-164-96]
2 & 3 DECEMBER 1996

CIVIL PROCEDURE: *Intervener proceedings - Principal objects - Whether to prevent injustice - Circumstances in which intended intervener allowed to intervene - Test - Whether must have some interest directly related to subject matter of action - Whether applicant's rights and liabilities affected by outcome of the action - Order 15 r. 2(b)(ii) Rules of the High Court 1980*

CIVIL PROCEDURE: *Intervener proceedings - Circumstances in which intended intervener allowed to intervene - Discretion of trial Judge - Review of discretion by appellate Court*

These two appeals were against the decision of the learned Judicial Commissioner dismissing the appellants' application to intervene in an originating motion filed by the first respondent against the Pengarah Tanah and Galian Perak, the second respondent herein. The facts showed that the appellants were purchasers of certain housing units in a housing project undertaken by one Columbia Kinta Sdn Bhd ('the developer'). Bridging finance for this project was provided by the first respondent who was also the chargee of the lands in question. This apart, the majority of the appellants were also granted loan by the first respondent. The developer abandoned the project midway and the borrower appellants thereafter refused to pay. The first respondent thereafter sued for recovery of the loan but the claims were dismissed by the Sessions Court. This matter was pending appeal.

By the aforesaid originating motion, the first respondet prayed for an order that the Pengarah Tanah dan Galian Perak, acting on behalf of the State Authority, issue documents of title as regards nine parent titles as regard the lands on which the housing project was being undertaken. The appellants applied for leave to intervene and state their case in this action arguing that they were the equitable owners of the lots concerned and that, having repaid all the loans, they were entitled to have their respective lots free from the encumbrance of the charge. The learned Judicial Commissioner ruled that the decision of the Court on the motion, whichever way it goes, will not affect the proprietary

rights of the appellants. The Court also found that the appellant in the second appeal herein had already sold the land forming part of the subject matter of the motion, and so, had no more interest on which to found the intended intervention. The appellants' applications, in the circumstances, were all dismissed against which the appellants have now appealed. The issues that arose were (i) whether the appellants on the facts ought to be allowed to intervene (ii) whether leave to intervene was required for an application for specific relief.

Held:
Per Abdul Malek Ahmad JCA

[1] As for the second appeal, no leave was required as the application involved specific relief. Also the matter therein involved titles to two shoplots and five double storeyed terrace houses the undisputed value which is worth more than RM 250,000.

[2] We were dumbfounded as to why the respondent was strongly resisting the appellants' applications to intervene in the matter. As purchasers of the relevant lots in question, and with the developer wound up, the appellants are really only interested in getting their titles free of incumbrances considering that they had fully paid their loans and stand in credit position as regards the accounting since damages for late delivery over a number of years were also due to them.

[3] In the circumstances of this case, and considering the relevant case and text authorities, the applicants should be given the opportunity to sort the matter out. We therefore do not agree with the conclusion of the learned trial Judicial Commissioner that "the presence of the applicants will not only proctract the proceedings but also complicate the issue unnecessarily".

[Appeal allowed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Prosiding pencelah - Objek utama - Samada untuk menghalang ketidak-adilan - Keadaan dalam mana pencelah yang dicadangkan dibenarkan mencelah - Ujian - Samada mesti mempunyai kepentingan yang berkaitan secara terus dengan hal-perkara tindakan - Sama ada hak dan tanggungan pemohon terjejas oleh hasil keputusan tindakan - Aturan 15 k. 2(b)(ii) Kaedah-kaedah Mahkamah Tinggi 1980*

PROSEDUR SIVIL: *Prosiding pencelah - Keadaan-keadaan dalam mana pencelah yang dicadangkan dibenarkan mencelah - Budibicara hakim perbicaraan - Kajian semula budibicara oleh Mahkamah Rayuan*

Kedua-dua rayuan ini adalah terhadap keputusan Pesuruhjaya Kehakiman yang bijaksana yang menolak permohonan perayu untuk mencelah dalam satu usul pemula yang telah difailkan oleh Responden pertama terhadap Pengarah Tanah dan Galian Perak, responden ke-2 di sini. Fakta-fakta menunjukkan bahawa perayu-perayu adalah pembeli beberapa buat unit rumah dalam sebuah projek perumahan yang dijalankan oleh Columbia Kinta Sdn Bhd (Pemaju tersebut). Pembiayaan penyambungan bagi projek ini telah diberikan oleh responden pertama yang juga merupakan pemegang gadaian tanah-tanah yang dipersoalkan. Selain ini, kebanyakan perayu-perayu telah juga diberikan pinjaman oleh responden pertama. Pemaju telah meninggalkan projek tersebut terbengkalai separuh jalan pembinaannya dan perayu-perayu peminjam selepas itu enggan membayar. Responden pertama kemudiannya telah mendakwa untuk mendapatkan pinjaman tersebut tetapi tuntutan tersebut telah ditolak oleh Mahkamah Sesyen. Perkara ini sedang menantikan rayuan.

Melalui usul pemula yang tersebut di atas, responden pertama telah memohon untuk mendapatkan satu perintah bahawa Pengarah Tanah & Galian Perak, yang bertindak bagi Pihak Berkuasa Negeri, hendaklah mengeluarkan dokumen-dokumen hakmilik berhubung dengan sembilan hakmilik induk berkaitan dengan tanah-tanah di atas mana projek perumahan itu dijalankan. Perayu telah memohon untuk mendapatkan kebenaran untuk mencelah dan menyatakan kes mereka dalam tindakan ini, dan berhujah bahawa mereka adalah tuanpunya yang saksama bagi lot-lot yang berkaitan dan bahawa, setelah membayar balik kesemua pinjaman tersebut, mereka berhak untuk mendapatkan lot-lot mereka masing-masingnya bebas daripada bebanan gadaian tersebut. Pesuruhjaya Kehakiman yang bijaksana memutuskan bahawa keputusan Mahkamah atas usul tersebut, walaubagaimanapun keadaannya, tidak akan menjejaskan hak keempunyaan perayu tersebut. Mahkamah juga mendapati bahawa perayu dalam rayuan kedua di sini telah pun menjual tanah yang membentuk sebahagian daripada hal perkara usul tersebut, dan dengan yang demikian, tidak lagi mempunyai kepentingan atas yang mana untuk mengasaskan campur tangan yang diniatkan itu. Permohonan perayu, dalam keadaan itu, telah kesemuanya ditolak, terhadap yang mana perayu-perayu telah kini memohon. Isu-isu yang berbangkit adalah (i) sama ada perayu-perayu berdasarkan fakta-fakta seharusnya dibenarkan untuk mencelah (ii) sama ada kebenaran untuk mencelah diperlukan untuk satu permohonan bagi relief spesifik.

Diputuskan:
Oleh Abdul Malek Ahmad HMR

[1] Berhubung dengan rayuan kedua, kebenaran tidak diperlukan kerana permohonan tersebut melibatkan relief spesifik. Dan juga perkara di dalamnya melibatkan hakmilik kepada dua lot kedai dan lima buah rumah teres dua tingkat, nilainya yang tidak dipertikaikan adalah lebih daripada RM250,000.

[2] Kami kehairanan mengapa responden dengan tegasnya menolak permohonan perayu untuk mencelah dalam perkara itu. Sebagai pembeli bagi lot-lot berkaitan yang dipersoalkan dan penggulungan pemaju tersebut, perayu adalah hanya sebenarnya berminat untuk mendapatkan hakmilik-hakmilik mereka bebas daripada bebanan, menimbangkan bahawa mereka telah membayar pinjaman mereka sepenuhnya dan kekal dalam keadaan kredit oleh kerana gantirugi bagi penghantar-serahan lewat selama beberapa tahun adalah juga kena dibayar kepada mereka.

[3] Memandangkan keadaan kes ini, dan dalam menimbang kes yang relevan serta teks autoriti-autoriti, pemohon haruslah diberi peluang untuk meleraikan perkara itu. Kami dengan itu tidak bersetuju dengan keputusan Pesuruhjaya Kehakiman perbicaraan yang bijaksana bahawa "the presence of the applicant will not only protract proceedings but also complicate the issue unneccessarily." (kehadiran pemohon bukan hanya akan memanjangkan prosiding tersebut tetapi juga mengelirukan isu tersebut dengan cara yang tidak seharusnya.)

[Rayuan dibenarkan.]

Cases referred to:

Spelling Goldberg Production v. B.P.C. Publishing Ltd. [1981] RPC (No. 17) 286 ***(dist)***

Pegang Mining Company Limited v. Choong Sam and Others [1969] 2 PCC 593 ***(refd)***

Lee Meow Lom v. Lee Meow Nyin t/a Cheong Fatt Merchant (Nabisco Brands (M) Sdn. Bhd. Intervener) [1990] 2 MLJ 123 ***(refd)***

Tohtonku Sdn. Bhd. v. Superace (M) Sdn. Bhd. [1992] 2 MLJ 63 ***(refd)***

Arab Malaysian Merchant Bank Berhad v. Jamaluddin bin Dato Mohd Jarjis [1991] 1 MLJ 27 ***(refd)***

Hong Leong Finance Bhd. v. Wong Chan Mew & 2 Ors. (Wong Bin Chen @ Ng Chi Leong & Anor. – Intervener) & Set Kon Kim as Applicant Intervener [1993] 2 AMR 50 3486 ***(refd)***

Tajjul Ariffin bin Mustafa v. Heng Cheng Hong [1993] 2 MLJ 143 ***(cit)***

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn. Bhd. [1995] 3 CLJ 783 ***(cit)***

Aik Ming (M) Sdn. Bhd. & 8 Ors. v. Chang Ching Chuen & 3 Ors. [1995] 3 AMR 2375 ***(cit)***

Hong Kong Bank Berhad (Malaysia) Berhad (Dahulunya dikenali sebagai The Hong Kong & Shanghai Banking Corporation v. Raja Letchumi a/p Ramarajoo & 6 Ors. [1996] 2 AMR 2553 ***(cit)***

Legislation referred to:

National Land Code 1965, s. 418

Rules of the Supreme Court, O. 15 r. 6(2)(b)(ii)

Trade Descriptions Act 1972, s. 16

Other source referred to:
Supreme Court Practice 1997, Vol. 1, Part 1, p. 210

[Appeal from High Court Malaya, Ipoh; Suit No:21-40-1995]

For the appellant in the 1st appeal - Gurbachan Singh; M/s. Bachan & Kartar
For the appellant in the 2nd appeal - Choy Kam Lee; M/s. K.L. Choy & Co.
For the first respondent in the 1st appeal & the respondent in the 2nd appeal - Hira Singh (Asbir Kaur with him); M/s. Asbir, Hira Singh & Co.
For the 2nd respondent in the 1st appeal - Absent

JUDGMENT

Abdul Malek Ahmad JCA:

These appeals stem from an originating motion filed in the High Court at Ipoh (OM No. 21-40-95) on 6 May 1995 by the first respondent in Civil Appeal No. A-01-164-96 (hereinafter 'the first appeal') against the second respondent in that same appeal, who did not appear before us, for the following orders:

(a) that the second respondent acting on behalf of the State Authority do issue or cause to be issued individual subdivided issue documents of titles over the lands held as follows:

	Title No.	Lot No.
1.	Grant 9873	16000
2.	Grant 9802	16001
3.	Grant 10061	16002
4.	C.T. 1199	16619
5.	Grant 10062	17162
6.	Grant 4345	7059
7.	Grant 11461	19312
8.	C.T. 26110	45189
9.	C.T. 26111	45190

(hereinafter 'the parent titles') all in the Mukim of Kampar, Daerah Kinta, Perak and the charge presentation No. 19782/82 Jilid 1351, Folio 33 dated the 15 October 1982 duly endorsed thereon pursuant to the second respondent's letter dated 13 January 1984 and hand them to the first respondent;

(b) further or in the alternative, the second respondent do cancel the memorials of surrender on the aforesaid titles and return the original issue documents of title to the first respondent together with all premiums and other charges totalling RM931,466.30 paid thus far with interest thereon.

Since the second respondent in the first appeal was not before us and since the first respondent in the first appeal is the same as the respondent in the second appeal, we shall hereinafter refer to the first respondent in the first appeal as the respondent for both appeals and reference to the second respondent would mean the second respondent in the first appeal.

On 30 November 1995, the appellants here had by summons in chambers applied for leave to intervene and consequently for leave to state the causes of action and to file a statement of claim in the matter, for costs, and for other consequential relief. This was dismissed by the learned trial Judicial Commissioner on 7 May 1996.

The facts are not exactly in dispute. The appellants had entered into sale and purchase agreements on various dates from 1984 to 1988 to purchase housing units in a project undertaken by Columbia Kinta Sdn. Bhd. (hereinafter 'the developer'). The usual application for subdivision was made as regards the nine parent titles as regards the lands on which the housing project was being undertaken.

The respondent was the chargee in the bridging loan taken by the developer and had consented to surrender the titles to the second respondent for the charges to be endorsed. The State Authority accepted the surrender on 31 October 1984.

Except for the 42nd, 43rd, and the 46th to the 65th appellants in the first appeal who took a Government loan, the rest had taken a loan from the respondent. The project was abandoned midway and the borrower appellants had justifiably refused to pay. The respondent sued for the recovery of the loan and the appellants had filed their defence and counterclaims. The Sessions Court had on 12 November 1993 dismissed the claims and allowed all the counterclaims for the refund of interest paid.

At this point of time, it is appropriate to reproduce the extract of the judgment of the Sessions Court as to the factual finding of the learned Sessions Court Judge on the issue of title:

> The next point that is raised by the defendants lies entirely on the evidence given by DW11, Encik Razman bin Hj. Yahya, the Timbalan Pendaftar Hak Milik, Perak. According to DW11 the lands in question have reverted to the State Government, Perak, by virtue of a surrender of the titles by the developer with the express consent of the plaintiff bank. Under the provisions of the National

Land Code such a surrender is an unconditional surrender with the land in question reverting to the State Government free of encumbrances. Such reverting tantamounts to forfeiture of the land by the State Government. DW11 produced all the original land titles, D88 A to D88 I, on which is endorsed the memorial pursuant (to) s. 198, National Land Code and the titles are cancelled. This surrender of titles is accepted on 31 October 1984 whereas the loan agreement, P21, is dated 25 July 1986 and the deed of assignment, P22, is also dated 25 July 1986 by which time there were no titles in existence. Although the plaintiffs submit that this surrender was conditional in that the charges would be carried forward onto the sub-divided titles the position in law however is clear i.e. the relevant authority has no power to accept a conditional surrender. The effect of the above is that the bank should know that as of the date of the loan agreement and deed of assignment the lands had reverted to the State Authority but it nevertheless proceeded to carry out a loan transaction when the subject matter i.e. the land was non-existent. On the other hand the purchasers were completely unaware of the status of the land at the relevant time.

Learned Counsel for plaintiff strenuously urged the Court not to consider the evidence of DW11 on the ground that this Court has no jurisdiction as to title. It can be seen from the paragraph above that I have made no finding as to title, the memorial that is endorsed in the titles D88 A to I and the evidence of PW11 thereon refers to a factual situation which affects the plaintiffs obligations to the defendants. In fact it was brought to my attention that the defendants made an application to transfer these actions to the High Court in view of the defendants prayers in the counter-claim. That application was opposed to by the plaintiffs Counsel on the ground that the said prayers could be determined as findings of fact. Therefore this matter proceeded before this Court and I have accordingly made findings of fact.

During the course of the trial various documentary exhibits were referred to by both sides and marked as exhibits to be identified (ID) since the admissibility of such documents were objected to by either side on the ground that the makers were not called. I rule that since these documents were not strictly proved as required by s. 73(a) of the Evidence Act 1950, thereby depriving the opposite party the opportunity to test the authenticity of their contents, such exhibits remain inadmissible.

Based on the evidence and the submissions in the two test cases the plaintiffs claim is dismissed with costs. The defendants counter-claim for refund of interest paid only is allowed with costs. As agreed between the parties this decision is binding on all the related actions.

He had also found that the architect's certificates for the progress payments were not quite in order. The relevant part of his judgment reads:

It is a fact in this case that all the relevant architects certificates are undated except certificate P40. On this issue whilst the bank seems to take the stand that the undating of certificates is immaterial to its contents it is the purchasers

contention that this is not so in view of the progress nature of the construction work to be certified. In this respect the architect who issued these certificates, PW4, agreed that he was in fact found to be wrong by the Lembaga Akitek Malaysia in not dating the certificates. He agreed that such non-dating of the certificates has always been an offence as far as the Lembaga is concerned. Yet PW4 did not openly agree to the defence suggestion that he was wrong in issuing undated certificates. In the course of the trial it became apparent that the dating of the certificates is indeed a crucial matter since it is tied to the issue of progress construction for which payment is made to the developer. In addition these certificates, being the only authority relied upon by the bank for making the loan disbursements, should be complete on the face of it including the relevant fact of the date when completion for a particular stage is certified. Although the banks officers seem to say that this is not so yet, according to PW2 and PW3, when they became aware of the undating they sent back the certificate for stage 2(f), P40, to the developer to be dated before payment was made. PW3 even under examination-in-chief, said, "If I had realised the certificates were undated I would recommend it to be dated before I recommended payment". PW2 under cross-examination, said "I agree it is vital that an architects certificate be dated to know when a particular stage is completed". As to the banks realisation of the undating PW2 said "Later was insisted that they be dated before we made the release." When shown the undated certificates P3A to P3F which plaintiffs rely on as proof of completion for stage 2(a) and payment thereof PW2 had this to say, "Yes, moneys were released based on certificates that were improper because they were undated. Yes, I agree a release based on improper certificates would be a wrongful release." The totality of the evidence of the bank's officers suggests that not only did the bank subsequently realised that dating of the certificates was important they agree that such dating was a vital part of a valid architects certificate. This ties up with the evidence led from the defendants architect, DW6, who stated that an architects certificate should always be dated as such date indicates the stage of work completed as of that date. The architects called by the plaintiff, PW1 and PW4 do not deny this.

In furtherance to the purchasers complaint of the banks negligence in releasing payments without due regard to the content of the said certificates learned defence Counsel, Encik Bachan Singh drew the Court's attention to the certificates marked exhs. P24 A to E. Attached to the notice of payment P25A is architects certificate P24A which certified the completion of stage 2(d) for Lots 267 to 283. For the same lots and for the same stage the plaintiff produced certificate P24D which is attached to the notice of payment P25D. This means that an identical certificate has been given by the developer requesting payment under two separate notice of payments, P25A received by the bank on 3 March 1986 whilst P25D is received by the bank on 16 June 1986. The bank did release these two payments as requested although the two certificates are for the same stage, for the same lots. Therefore, as these exhibits stand and having been verified by the banks officers, they show that separate releases are made for the same stage of completion which cannot logically be the case. This fortifies the defence contention of reckless release on architects certificates and supports the

defence suggestion that the bank has not been vigilant in a situation where blank certificates could have been left with the developer.

On 29 March 1990, the developer was wound up and although the balance of the progress payments were due from the appellants to the developer at that stage, learned Counsel for the appellants in the first appeal had submitted that the late delivery and set off took care of the balance as they were in credit position and accordingly had become equitable owners.

The sixth appellant's affidavit at p. 112 at para. 13 in particular states:

> The intended interveners have all paid the full purchase price by way of payments of deposits, loans releases and set off by way of a liquidated damages for late delivery. The late delivery claims at the rate of 10% per annum of the purchase price commenced from in or about late 1986. As such the intended interveners have become the beneficial and equitable owners of the land purchased by the intended interveners respectively.

Learned Counsel further stressed that the appellants had nothing to do with the bridging loan charge for the nine parent titles but as actual and beneficial owners, they had proprietary interest as they would now be saddled with the charges in the name of the respondent. By intervening, they could avoid duplicity of proceedings and he was also of the view that the respondent should not have taken out the notice of motion while the appeal against the Sessions Court decision was still pending.

On the other hand, learned Counsel for the respondent contended that the appellants should not and need not intervene at this stage citing *Spelling Goldberg Production v. B.P.C. Publishing Ltd.* [1981] R.P.C. (No. 17) 286 as a case on point. There the trial Judge had held that it did not constitute an infringement of the copyright in a cinematograph film to reproduce individual frames in the defendants' magazines and posters. The applicants for intervention, who were film companies, feared that the decision, if it stood, would adversely affect them, and desired to intervene in the appeal in support of the plaintiffs. They contended that there was jurisdiction to allow them to intervene under RSC O. 15 r. 6(2)(b)(ii), because a question or issue might arise between them and the defendants if the defendants were to copy frames from the interveners' films in the same way as they had from the plaintiffs'. The Court of Appeal in England dismissed the application to intervene holding that there was no jurisdiction to allow the film companies to intervene, since RSC O. 15 r. 6(2) required there to be a present "question or issue" between the parties to the appeal and the interveners. The mere possibility that the defendants might in future copy frames from the interveners' films if they were successful on the appeal did not give rise to such a question or issue, and even if there was jurisdiction to accede to the application, as a matter of discretion it should be refused.

We hasten to add that we were immediately conscious that the facts in that case were quite distinguishable and this prompted my learned brother Shankar, JCA, who was chairing the panel, to refer learned Counsel to *Pegang Mining Company Limited v. Choong Sam and Others* [1969] 2 PCC 593 in particular to the passage at p. 602 which reads:

> The cases illustrate the great variety of circumstances in which it may be sought to join an additional party to an existing action. In their Lordships' view one of the principal objects of the rule is to enable the Court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. To achieve this object calls for a flexibility of approach which makes it undesirable in the present case, in which the facts are unique, to attempt to lay down any general proposition which could be applicable to all cases.
>
> It has been sometimes said as in *Moser v. Marsden* [1982] 1 Ch 487 and in *In re IG Farbenindustrie AG* [1944] Ch 41 that a party may be added if his legal interest will be affected by the judgment in the action but not if his commercial interests only would be affected. While their Lordships agree that the mere fact that a person is likely to be better of financially if a case is decided one way rather than another is not sufficient ground to entitle him to be added as a party, they do not find the dichotomy between legal and commercial interest helpful. A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?.

When hearing resumed the following morning, Hira Singh and Asbir Kaur of learned Counsel for the respondent who took turns in submitting, tendered their written submissions which laid down the following five propositions:

(a) The High Court under O. 15 r. 6(2)(b)(ii) Rules of the High Court 1980 has no jurisdiction to allow a non-party to intervene in the originating motion brought under s. 418 of the National Land Code 1965 under the circumstances of this case.

(b) The respondent/Bank does not step into the shoes of the insolvent developer in an abandoned housing scheme of the kind under appeal.

(c) The interest of the non-party must be viewed and decided as a question of fact from the contemporaneous documents before the Court and not the allegations from the Counsel from the Bar and disputed facts on affidavits.

(d) The discretion of the High Court Judge cannot be substituted by the appellate Court by its own without consideration of the principles enunciated by the Court itself.

(e) The Appeal No. A-02-339-96 is incompetent under s. 68 of the Courts of Judicature Act 1964.

Learned Counsel had then referred us to *Lee Meow Lim v. Lee Meow Nyin t/a Cheong Fatt Merchant (Nabisco Brands (M) Sdn. Bhd. (Intervener)* [1990] 2 MLJ 123. Eusoff Chin J (as he then was) had stated:

> Nabisco's application to intervene is based on the fact that it had obtained judgment against the respondent (tenant) on 25 January 1988 and had earlier obtained and executed an order for attachment before judgment against the respondent on 8 January 1988, i.e. three days after the writ of distress was obtained by the applicant (landlord). The purpose of the intervening action is to get the writ of distress set aside so as to disentitle the landlord/applicant from the proceeds of the auction sale of the property of the tenant/respondent. The question is whether Nabisco should be allowed to intervene in the action for writ of distress.
>
> In *Sanders Lead Co. Inc v. Entores Metal Brokers Ltd.* [1984] 1 WLR 452, the Court of Appeal held that a person had to have an interest directly related to the subject matter of an action before he was entitled to intervene in the action under RSC O. 15 r. 6(2)(b)(ii). A mere commercial interest in the outcome of the action, divorced from its subject matter, such as interest of a creditor of one of the parties, was not sufficient to entitle a person to intervene.
>
> Nabisco is clearly a creditor of "one of the parties", i.e. the respondent in the distress action. He should not have been allowed to intervene in this action.

Learned Counsel continued by saying that this is not a normal action but one under s. 418 of the National Land Code 1965. He conceded that the *Pegang Mining* case was a landmark decision but the Supreme Court and the High Court in this country had in their numerous decisions interpreted it in a certain way.

He had cited *Tohtonku Sdn. Bhd. v. Superace (M) Sdn. Bhd.* [1992] 2 MLJ 63 which was an appeal against the decision of the High Court which said that the respondent had a direct interest in the matter and should be allowed to intervene in the proceedings and also that the appellant's rights in respect of the trade mark "MISTER" had not been infringed. The appellant had applied under s. 16 of the Trade Descriptions Act 1972 for an order declaring the respondent's trade mark "SISTER" was a false trade description for the purposes of the Act. In dismissing the appeal, the Supreme Court held that in determining whether a party may be added as an intervener, the test is if his "legal interests", i.e. his rights against or liabilities to any party to the action in respect of the subject matter of the action, would be directly affected by order or judgment which might be made in the action.

He had also referred to *Arab Malaysian Merchant Bank Berhad v. Jamaluddin bin Dato' Mohd Jarjis* [1991] 1 MLJ 27 where at p. 28 the Supreme Court had concluded as follows:

One of the class of cases covered by the said rule, which allows intervention by persons not parties, is where the proprietary or pecuniary rights of the intervener are directly affected by the proceedings or where the intervener may be rendered liable to satisfy any judgment either directly or indirectly. The ambit of this class has been materially widened by the decision of the UK Court of Appeal in *Gurtner v. Circuit* [1968] 1 All ER 328, the effect of which is to include any case in which the intervener is directly affected not only in his legal rights but in his pocket. In this connection, we would refer to and respectfully adopt the follow dictum of Lord Denning MR, in that case, in which his Lordship said as follows:

> It seems to me that, when two parties are in dispute in an action at law and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the Court in its discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the Court achieves the object of the rule. It enables all matters in dispute to be effectually and completely, determined and adjudicated upon between all those directly concerned in the outcome.

In our present case, we considered that the respondent, who had undertaken to pay the debt of the judgment debtors, would not only be affected in his legal rights but also in his pocket in that he would be bound to foot a larger bill if the judgment in default, which includes excessive interest, is not set aside. Both the learned Judge and the Senior Assistant Registrar were therefore right in exercising their discretion to allow the respondent to intervene in the said suit between the appellant and the judgment debtors, and the learned Judge had correctly dismissed the appellant's appeal to him. The was the reason why we confirmed the High Court's decision and also dismissed this appeal to us with costs.

These cases were discussed in *Hong Leong Finance Bhd. v. Wong Chan Mew & 2 Ors. (Wong Bin Chen @ Ng Chi Leong & Anor., Intervener) & Set Kon Kim as Applicant Intervener* [1993] 2 AMR 50 3486 where the learned trial Judicial Commissioner said at pp. 3489 and 3490:

> The decision in *Pegang Mining* was followed by the Supreme Court in *Tohtonku Sdn. Bhd. v. Superace (M) Sdn. Bhd.* [1992] 2 MLJ 63. In *Tohtonku* Mohamed Yusoff SCJ applied the test formulated in *Pegang Mining*. His Lordship rules (at p. 65):
>
> > In that case *(Pegang Mining)*, the Privy Council had formulated the test to aftermine whether a party's interests in the matter are "legal" or merely "commercial" in the following words (at p. 56):
> >
> > > A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in this action?

> The answer to that question, as far as the interveners in this case are concerned, is definitely in the affirmative. We therefore hold that the learned trial Judge was correct in his decision on this point.

I agree with the submissions of Kannaperan and Joginder Singh. In my opinion, *Arab Malaysian* cannot be said to be an authority for the proposition suggested by Yusuf Khan who, in his submission, placed much reliance on the words "in his pocket" used in the judgment in that case. In my view, that expression must be interpreted and understood in the context of the facts of that case. Unlike the applicant in the present case, the applicant in *Arab Malaysian*, in presenting his case was not relying purely on financial or commercial considerations. In that case, it is to be noted that, subsequent to the judgment obtained by the plaintiff against the defendants/debtors, the proposed intervenor had entered into an agreement with the plaintiff undertaking to pay the defendants'/debtors' debt by monthly instalments. Hence, there was an element of a legal liability on his part towards the plaintiff. If he was not allowed to intervene, he had to bear whatever amount under the judgment that was obtained against the debtors, which (as alleged by the applicant in that case) was much more than it should be. As the Court said, he would be bound to foot a larger bill. In other words, the Supreme Court in *Arab Malaysian*, in using the expression "in his pocket", was using it in a restrictive sense and not in the broader sense as suggested by Yusuf Khan. Therefore, with respect to learned Counsel, I do not think that the Supreme Court in *Arab Malaysian* had, in any way, departed from the approach adopted by the Privy Council in *Pegang Mining* and had instead adopted a more liberal approach on the question of intervention. Indeed, as has been noted above, *Tohtonku*, a case more recent then *Arab Malaysian*, clearly confirms that the test as formulated by the Privy Council in *Pegang Mining* is still applicable and that there has been no shift in judicial policy in favour of a more liberal approach.

Reverting to the instant case, the learned trial Judicial Commissioner had stated in his judgment that:

> From the affidavit evidence filed herein, two grounds are raised in support of their applications, they being:
>
> 1. they are the owners of the lots concerned, short of their names being registered therein;
>
> 2. they in their purchase having repaid all the loans, are entitled to have their respective lots free from the encumbrance of the charge.

Learned Counsel questioned that fact that if the appellants claimed that they had already paid, where was the interest? He added that if he were a purchaser, he would have immediately gone to Court to get relief. Further, he said the appellants had no interest in the charge which is bridging finance and if they had fully paid, no bank would ever dare continue the charge.

He had consequently referred to the learned trial Judicial Commissioner's conclusion which reads:

> Bearing the aforesaid principle in mind, I now turn to consider the affidavit evidence in this case. Right at the outset of his submission, Counsel for the plaintiff neither claimed ownership legal or equitable to those titles nor anywhere in their affidavit evidence suggested to dispute the entitlement or the proprietary rights of the intended interveners to their respective lots concerned. The question at issue in the motion between the plaintiff and the defendant is whether or not the registered charge ought to be carried forward from the parent titles to and endorsed on the individual titles upon their issuance. The decision of the Court on the motion whichever way it goes, will not affect the propreitary rights of these intended interveners at all. Therefore, the proprietary interest is not even remotely related let alone directly related to the subject matter of the motion. The issue is one of mixed facts and law strictly between the plaintiff and the defendant, independent and apart from the issue whether or not the loan of the intended interveners had been repaid in full or whether there was an absolute assignment as in the case of application (at) Encl. 31. If, by way of amplification, the loan had been repaid in full, then it is a matter of administration conversant to any conveyancing lawyer, before the title is discharged of the charge. In any event, at the most they may have to incur some monetary loss for administrative expenses. The participation of the intended interveners furthermore will not help to resolve the question at issue in the motion nor the decision will affect their proprietary rights, because, I repeat, no decision is being called for in this respect. The presence of these applicants will not only protract the proceedings, but also complicate the issue unnecessarily. It cannot be said that these applications come within O. 15 r. 6(2)(b) of the Rules. In the event the Court refuses to exercise its discretion in favour of the applications. The applications are dismissed with costs to the plaintiff.

He had also referred to the *Supreme Court Practice 1997*, Vol. 1, Part 1 at p. 210 which states:

> Interest of intervening party – To entitle a person not a party to an action to intervene and to be joined as a party, the rule requires that the would-be intervener should have some interest which is directly related or connected with the subject matter of the action, and therefore an alleged creditor who has obtained a Mareva injunction against a subsidiary company of the plaintiffs will not be allowed to intervene or to be joined as a party to an action between plaintiffs and defendants with which he is in no way concerned, and in which he has no interest, other than a financial interest in the outcome of that action, which might be liable to destroy the effectiveness of his injunction (*Sanders Lead Co. Inc. v. Entores Metal Brokers Ltd.* [1984] 1 WLR 452; 1 All ER 857 CA),

and to a number of the authorities namely *Tajjul Ariffin bin Mustafa v. Heng Cheng Hong* [1993] 2 MLJ 143, *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn. Bhd.* [1995] 3 CLJ 783 and *Aik Ming (M) Sdn. Bhd. &*

8 Ors. v. Chang Ching Chuen & 3 Ors. [1995] 3 AMR 2375 as regards joinder of parties and to *Hong Kong Bank Berhad (Malaysia) Berhad (Dahulunya dikenali sebagai The Hongkong & Shanghai Banking Corporation v. Raja Letchumi a/p Ramarajoo & 6 Ors.* [1996] 2 AMR 2553 as regards the review of discretion by an appellate Court.

As for the second appeal, he reiterated that the appellant had sold the land, and in any case, the appeal is incompetent as the value of the subject matter is below RM250,000 and no leave had been obtained.

Gurbachan Singh of learned Counsel for the appellants in the first appeal had referred to p. 309 of the appeal record where at the centre of the page the notes of evidence in the Sessions Court state:

> (Cik Asbir: In these cases the bridging loan has been paid off in respect of all the defendants).

He had also referred to para. 8 of the affidavit of the sixth appellant in the first appeal at pp. 110 and 111 of the Appeal Record which reads:

> 8. During the course of hearing of the test cases, Counsel for the plaintiffs, that is UMBC, conceded and stated that the 1st to 47 intended interveners titles have all be (en) redeemed and that the balance of the bridging loans have been paid in full. This meant that those titles were completely free from encumbrances. A photocopy of the extracted Notes of Evidence stating this fact is annexed herewith and marked as "D".

He said this was never denied by the respondent adding that all the appellants were concerned with was for leave to intervene and to state their case as they were only interested in the titles.

Choy Kam Lee of learned Counsel for the appellant in the second appeal told the Court that the matter involved seven titles two of which were shoplots and five double storeyed terrace houses. He added that the undisputed value of a single storeyed house is RM58,000 and accordingly the value of the seven titles is worth more than RM250,000 and, therefore, leave is not necessary. In any case, he continued, no leave was required for an application for specific relief. In this respect, we were totally with him that no leave was required for the second appeal.

At the end of the day, we were somehow dumbfounded why the respondent was strongly resisting the appellants' applications to intervene in the matter because as purchasers of the relevant lots in question and with the developer wound up, the appellants are really only interested in getting their titles free of encumbrances considering that they had fully paid their loans and stand in credit position as regards the accounting since damages for late delivery over a number of years were also due to them.

This was, however, not the end of the problem. This is only the application to intervene and the issues would eventually have to be argued and determined. It is our thinking that in the circumstances of this case and considering the case and text authorities cited, the appellants should be given the opportunity to sort the matter out. We, therefore, do not agree with the conclusion of the learned trial Judicial Commissioner that "the presence of the applicants will not only protract the proceedings, but also complicate the issue unnecessarily."

We had, therefore, allowed the appeals with costs with the order that in the Court below, the costs would be payable in any event. The orders of the learned trial Judicial Commissioner were set aside and the deposits refunded to the appellants.

Reported by WA Sharif